®

IN THE HIGH COURT OF KARNATAKA

CIRCUIT BENCH AT DHARWAD

DATED THIS THE 3RD DAY OF OCTOBER 2012

PRESENT

THE HON'BLE DR. JUSTICE K. BHAKTHAVATSALA

AND

THE HON'BLE MR.JUSTICE B.SREENIVASE GOWDA

ITA NO.5049/2010

BETWEEN

1. The Commissioner of Income Tax,
Kimjibhai Complex,
Ambedkar Road,
Belgaum.

2. The ACIT (Inv),
Circle-1,
Kimjibhai Complex,
Ambedkar Road, Belgaum. Appellants

(By Sri Y V Raviraj, Adv., for appellants)

AND

Smt. B Sumangaladevi,
'Jibal', BSK, 3rd Stage,
V Block, 2nd Main, 1st A Cross,

R-3, Bangalore. Respondent

(By Sri H R Kambiyavar, Adv., for respondent)

This Income Tax Appeal is filed under Section 260A of the Income Tax Act, 1961, against the order dated 1.12.2004 passed in ITA No.77/PNJ/2002 on the file of Income Tax Appellate Tribunal Panaji Bench, Panaji.

This Appeal coming on for hearing, the same having been heard and reserved for pronouncement of Judgment, Dr. Bhakthavatsala, J., delivered the following:

ORDER

This is an Appeal filed under Section 260A of the Income Tax Act, 1961, by the Revenue, questioning the legality of the order dated 1.10.2004 made in ITA No.77/PNJ/2002 on the file of Income Tax Appellate Tribunal (ITAT), Panaji Bench at Panaji, confirming the order of the Commissioner of Income Tax (Appeals), at Belgaum.

2. Brief facts of the case leading to the filing of the Appeal may be stated as under:

During the course of Income Tax Department Search in the case of B.B.Swamy on 10.12.1991, the Income Tax Department seized certain amount and as per the provisions of the Income Tax Act, 1961 (in short 'the act'), the same was adjusted as against the income tax demand raised against him. Further, simultaneous search was conducted at Bangalore in the residence and factory of Smt.B.Sumangala Devi (in short 'the assessee') who is close associate of B.B.Swamy and seized gold, cash, silverware, other valuables and incriminating documents. During the assessment year 1992-93, the Assessing Officer held that the assessee had sold plots bearing Nos.9, 10 and 11, (acquired on 25.02.1983, 31.03.1983 and 08.03.1983 respectively, all situated at Belgaum) and made capital gains on the sale of those plots. She challenged the assessment order before the Commissioner of Income Tax (Appeals) contending that the plots sold by her were belonged to B.B.Swamy and the sale consideration was transferred to him and she has not made any capital gains on account of sale of the plots. The assessee challenged the assessment order before the Commissioner of Income Tax (Appeals) who confirmed the

order of the Assessing officer holding that the assessee made capital gains and it has to be assessed in her hands, but directed the Assessing Officer to give credit of ₹10,00,000/- seized in the hands of B.B.Swamy to the assessee as against her tax liability. Hence, the Assessing Officer filed an application before the C.I.T (Appeals) seeking withdrawal of the direction in so far as giving credit of the amount seized in the hands of B.B.Swamy to the assessee, but it was rejected. The Revenue unsuccessfully approached the ITAT. Thus, the Revenue is before this Court.

3. The Revenue has urged the following grounds:

(i) that as per Section 132B of the Act, the seized money shall be applied by the Assessing Authority for discharge of liability of the Assessee from whom the money is seized and if there is any excess amount, the same shall be refunded to the person from whom it was seized, but the Tribunal has lost sight of it;

(ii) that the Tribunal erred in not noticing the fact that as per the provisions of the Act, amount of ₹10,00,000/-, which was seized in the hands of B B Swamy, was adjusted towards his tax liabilities, for which he did not raise any objection;

(iii) that the Tribunal erred in not noticing the fact that there is no finding to establish that amount of ₹10,00,000/- seized in the hands of B B Swamy was due to the Assessee; and

(iv) that the Tribunal grossly erred in confirming the order of the Commissioner of Income Tax (Appeals) as there is no provision under the Act to implement the directions given by the Commissioner of Income Tax in his order.

4. On service of notice in this appeal, the respondent/assessee entered appearance through his counsel.

5. The Revenue had filed an application for condonation of delay of 1942 day in filing the appeal (vide Misc.Cvl.109896/2010 filed under Section 5 of Limitation Act read with Section 206(A) of the Act). In view of huge tax liability as well as public interest and in the light of the ratio laid down by the Hon'ble Apex Court in the case of ***Commissioner of Income Tax*** v ***WEST BENGAL INFRASTRUCTURE DEVELOPMENT FINANCE CORPORATION LIMITED***, (vide order dated 10.112.2010 made in Civil Appeal No.10462 of 2010), the delay in filing the appeal was condoned and the appeal was admitted.

6. We have heard the learned counsels for the parties in this appeal.

7. Learned counsel for the Revenue reiterated the grounds as urged in the memorandum of appeal. He also

submits that the Commissioner of Income Tax (Appeals) though held that the assessee is liable to pay tax on the capital gains and without there being any proof that the money seized in the hands of B.B.Swamy belongs to the appellant, erred in directing the revenue to adjust the amount of ₹10,00,000/- seized in the case of B.B.Swamy to the case of assessee and the Income Tax Appellate Tribunal also erred in confirming the Order of the Commissioner of Income Tax (Appeal). He submits that the Instruction issued by Board dated 09.02.2001 is prospective in effect and not retrospective and the assessee cannot take advantage of the Instruction and decision of this court made *in re Ranka and Ranka (reported in 2012(73) Kar.L.J.30 (HC) (DB)* holding that the instruction No3, issued by the Board is applicable to the pending cases filed prior to 09.02.2011 has been challenged before the Apex Court.

8. On the other hand, learned counsel for the respondent/assessee submits that there is no illegality or infirmity in the impugned Orders. He submits that in view of the Instruction dated 09.02.2011 issued by the Board as the

tax effect does not exceed the monetary limit, viz., ₹10,00,000/- the revenue should not have filed the appeal under Section 260-A of the Act. He further submits that the impugned Order of the commissioner of IT (Appeals) is in relation to adjusting a sum of ₹10,00,000/- seized in the case of B.B.Swamy was ordered to be adjusted towards the tax liability of the assessee. He relies on the decision reported in the case of ***THE COMMISSIONER OF INCOME TAX, BANGALORE AND ANOTHER vs. RANKA AND RANKA, BANGALORE***, supra, on the point that the instruction No.3, dated 09.02.2011 issued by the Board is applicable to pending appeal also where tax liability is not above ₹10,00,000/-

9. In view of the arguments addressed by the learned counsels for the parties, we formulate the following substantial questions of law for consideration in this appeal:

> (i) Whether the Board's Instruction No.3/2011 dated 09.02.2011 is applicable to the pending cases?"

(ii) Whether the ITAT is correct in law in upholding the CIT(A)'s direction to give credit of ₹10,00,000/- to Smt.Sumangala Devi, the respondent/assessee, seized from late B.B.Swamy, which was also adjusted against the tax liability of B B Swamy?

10. Our answer to the above points is in the negative for the following reasons:

Question No.(i)

11. It is useful to refer to the maxim **"Drops of water make an ocean".** Modern economy rests on the economy of growth, which demands resources. Income Tax is a very important direct tax and it is an important source of revenue for the Government. The Government needs money to maintain law and order in the country; safeguard the security of the country from foreign powers and promote the welfare of the people. It is the duty of the Government to bring out such welfare and development programmes which will bridge the gap between the rich and the poor. All this requires mobilization of funds from various sources. The sources may

be direct or indirect. The administration and collection of Income- Tax is vested in the Central Govt., but the net proceeds of the tax are apportioned between the Centre and the States. However, Income Tax of companies; the proceeds of the tax attributable to Union territories; tax payable in respect of the union emoluments paid out of the consolidated fund of India and surcharge on income tax levied for purposes of the Union are excluded from the divisible pool. The amount excluded from the divisible pool goes to the Central Government. The principles regarding the distribution of the remaining amount are determined by the Finance Commission, which is appointed every five years. The Board is constituted under the Central Board of Revenue Act, 1963. It is one of the six authorities constituted under the Act (vide Sec.116 of the Act). This is the highest Executive Authority for administering the direct tax. It controls all the Income Tax authorities that are appointed under the Income Tax Act. It is empowered to issue orders and directions to all the officers employed in the department and to make rules for carrying out the provisions of the Act (vide Sec 119 and 268A of the Act). Taxpayers desire to

reduce their tax liability to the minimum. Whereas the desire of the Government is to increase the revenue through direct taxes and that has resulted in making the tax problems very complicated and often controversial.

12. Various High Courts namely Madras (see *Commissioner of Income Tax V Kodanad Tea Estates Company –reported in (2005)275 ITR 244* (mad), Kerala (see *Commissioner of Wealth Tax V John L.Chackola- reported in (2011)337 ITR 385 (Ker)* and Chattisgarh (see *Commissioner of Income Tax v Navabhrat Explosives Company Private Limited-reported in(2011)337 ITR 515 (Chattisgarh),* have held that the Boards Instruction dated 15.05.2008 is prospective. In the case of Commissioner *of Income Tax v Varindera Construction Company- reported in (2011)331 ITR 449 (P and H),* High Court of Punjab & Haryana has held that there is no scope for reading the circular issued under Section 268A of the Act as being applicable to pending appeals. Whereas the High Courts, viz., Bombay (see *Commissioner of Income Tax v Pithwa Engineering Works- reported in (2005)276 ITR 519 (Bom)* and (see *Commissioner of Income Tax v Madhukar K.*

Inamdar (HUF) reported in (2009)318 ITR 149 (Bom).; Madhya Pradesh (see *Commissioner of Income Tax v Ashok Kumar Monibhai Patil and Company reported in (2009)317 ITR 386 (MP) (DB),* and Delhi (see *Coomissioner of Income Tax v P.S.Jain and Company –reported in (2011)335 ITR 591(Del)* have held that the Instruction issued by the Board is applicable to pending cases also.

13. *In re Ranka and Ranka, (reported in 2012(73) Kar.L.J.30 (HC) (DB)* co-ordinate Division Bench of this court, relying upon the decision made by the Apex court In *COMMISSIONER OF CENTRAL EXCISE, BANGALORE vs. MYSORE ELECTRICAL INDUSTRIES LIMITED (2006) 12 SCC 448*, dismissed the appeal filed by the Revenue on the ground that the Instruction No.3/2011 dated 09.02.2011 is applicable to the pending appeals also, where the tax effect was below 10 lakhs. The question that arose for before the Apex Court, in the above said was,

> **(a) Whether the single panel circuit breakers are classifiable under Chapter Sub-heading 8535 (rate of duty 5%) as claimed by**

the addressee or under chapter sub-heading 8537 (rate of duty 20%) as per the revenue?
And

(b) **Whether the Board circular Dt. 14.7.1994, which has classified that the single panel circuit breakers are classifiable under chapter 8537 has retrospective effect?**

Under the Central Excise Tariff Act, 1985 and the Rules, 1944, the Board had issued a Circular dated 14.7.1994 with regard to classification of goods. Hence the apex court in the above said case has held that such a circular with regard to the classification of goods is applicable to the pending disputes. The above ratio is not applicable to the facts and circumstances on hand.

14. It appears that in view of the national litigation policy, the Board has issued the instruction with regard to filing of appeals before the Tribunal/Courts fixing monetary limit/tax effect. The Central Govt. has formulated the national litigation policy in October 2009 with the object of reducing cases pending in various courts and to see the average pendency of any litigation in any Court does not

exceed three years. The instruction issued by the Board itself clarifies that the instruction will apply to appeals filed on or after February 9th 2011 and the cases where appeals have been filed before 09.02.2011 will be governed by the instruction on the subject, operative at the time when such appeal was filed (vide Clause 11 of the instruction No.3dated 09.02.2011).

15. When Clause 11 of the instruction No.3/11 dated 09.02.2011 issued by the Board, specifically says that it will be applicable to the cases filed on or after 9.2.2011, the courts hoiding that it is applicable to the pending cases is against the provision under Section 268A of the Act, Public Interest and the Public Policy. Therefore, we uphold the contention of the revenue that the Instruction No.3 dated 09.02.2011 has no retrospective effect and the appeal filed by the revenue is maintainable. Accordingly, we answer the 1st substantial question of law, in the negative in favour of the Revenue.

Question No.(ii)

16. With regard to the 2nd substantial question of law is concerned, it is necessary to refer to section 132B of the Act, which deals with regard to disposal of seized assets. The money seized was already adjusted towards tax liability of Sri. B.B.Swamy and there is no material on record to show that the money seized in the hands of B.B.Swamy belongs to the assessee. Further, there is no finding by the First Appellate authority that the money seized in the hands of Sri. B.B.Swamy belongs to the Assessee and under such circumstances the direction issued by the Commissioner of Income Tax (Appeals) to give credit to the assessee to the extent of ₹10,00,000/- which was seized from late Sri.B.B.Swamy is not sustainable in law. The Tribunal erred in confirming the order of the Commissioner of Income Tax (Appeals). Accordingly, we answer the second Substantial question of law also in the negative, in favour of the Revenue.

17. In the light of the our reasoning in paragraph at 11, supra, we deem it proper to make some suggestions to the Union Government to reduce the tax burden/ rate of Income tax on the existing Income tax payers, by bringing more persons under the Income tax net. If so, the existing tax payers would not evade tax and income tax disputes also will come down. Hence, we make the following suggestions:-

(i) That all Government servants, under the State/Centre (who are not assessees under the Income Tax), shall be made liable to pay Income Tax of atleast ₹ 1,000/- per annum;

(ii) That all male graduates, who are mentally and physically sound, aged between 31 years to 60 years (who are not assessees under the Income Tax), shall be made liable to pay Income Tax at least ₹ 1000/- per annum and protect their interest on attaining age of 61 years by providing pension;

(iii) That Election law may be amended prescribing a condition that every male person

contesting election to the State assembly/Parliament shall be an income tax assessee;

18. For the foregoing reasons stated supra, we pass the following order; -

Appeal is allowed. The Impugned order of the first appellate authority and the Tribunal, in so far as the direction given to the Revenue, to adjust the amount seized in the hands of Sri. B.B.Swamy towards tax liability of the Assessee, are set aside.

The Registry is directed to send copy of this order, immediately, to the Secretary to Union Finance Department and the Secretary to Law Commission for necessary action.

Sd/-
JUDGE

Sd/-
JUDGE

Bjs/bnv